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November 20, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: 1998 Biennial Regulatory Review -- Streamlining of Cable Television Services Part
76 Public File and Notice Requirements, CS Docket No. 98-132. /

Dear Ms. Salas:

Pursuant to 47 C.F.R. §1.1206(b), we are submitting the original and one copy of the attached ex parte letter for inclusion in the public file. We acknowledge that the comment and reply comment periods have lapsed. We did not realize until after reviewing the comments that this proceeding involved substantive issues of broad concern to the public. We believe our comments will be helpful to the Commission as it received no other significant comments from groups representing the viewing public.

Sincerely,

Angela J. Campbell

Angela J. Campbell, Counsel for
Center for Media Education
Alliance for Community Media
Consumer Federation of America
Consumer's Union
Media Access Project
OMB Watch
The Civil Rights Forum

cc:
Deborah A. Lathen, Chief, Cable Services Bureau
William H. Johnson, Deputy, Cable Services Bureau
Donald Fowler, Special Advisor, Cable Services Bureau
Chairman William Kennard
Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William Kennard
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Re: *1998 Biennial Regulatory Review — Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, CS Docket No. 98-132.

Dear Mr. Kennard:

We are writing on behalf of the Center for Media Education, Alliance for Community Media, Consumer Federation of America, Consumer's Union, Media Access Project, OMB Watch and The Civil Rights Forum, to express our views about recent FCC proposals to revise the public file and notice requirements for cable systems. Some of the changes proposed could have serious consequences for the public, and yet to date the Commission has heard only from the cable industry.

We have no objection to reorganizing the Part 76 public file and notice requirements to make it easier for cable companies to comply with the Commission's rules. Indeed, the difficulties that some of us have had in gaining access to the public files in the past suggests that cable companies do need greater guidance on what is required.¹

¹Specifically, an intern conducting research on behalf of CME in the fall of 1994 attempted to determine whether three cable companies operating in the Washington, D.C. metropolitan area were in compliance with the children's advertising limits. Only one of the three companies had adequate records for this purpose. One company told the intern that they had no records because they were only required to keep records for locally originated children's program and they had no locally originated children's programs. Another company initially

We agree that the Commission should not make any substantive changes that would impede its "continuing mission to protect consumers, enforce [its] rules, and promote competition." *NPRM*, FCC 98-159, at ¶1. Specifically, we object to the proposed elimination of reporting requirements related to commercial limits on children's programming (§76.225) and sponsorship identification (§76.221). We also oppose the proposals to permit cable operators to provide information to the public only upon request and to expand the exemption for small cable system operators.

As a threshold matter, we note that several cable operators argue that the public file requirements should be eliminated because members of the public rarely ask to see the public file. We suspect that this is the case because most members of the public are unaware of the existence of these files and of their right to inspect them. Rather than eliminate the requirement to keep these files, however, the FCC and the cable companies should explore ways of publicizing the availability of such information and making it easier for the public to access it by, for example, placing the information on a station's website.² The Commission should also issue periodic reminders to cable operators, warning them not to require members of the public to make an appointment in advance or to return another time to inspect the public file, as it did for broadcasters. *See Availability of Locally Records for Inspection By Members of the Public*, Public Notice, DA 98-1895 (September 28, 1998).

The Commission Should Not Modify or Eliminate the Reporting Requirements for the Commercial Limits on Children's Programming.

Some cable companies have proposed eliminating Section 76.225's requirement that cable operators maintain records to verify compliance with the limits on the amount of commercials aired during children's programming. *See, e.g., CATA Suggested NPRM*, at ¶¶ 13-15; *Ameritech Comments*, at 5-6. The FCC adopted this rule to implement the Children's Television Act of 1990 (the "CTA"), in which Congress directed the FCC to restrict the amount of commercial matter on children's programs shown on both television broadcast stations and cable systems. 47 U.S.C. § 303a.

claimed the same thing, but upon further questioning, acknowledged that such files existed but required the intern to make an appointment for a later date to view them, in violation of FCC policy. *See Availability of Locally Maintained Records for Inspection By Members of the Public*, 28 FCC 2d 71 (1971).

²In *Policy and Rules Concerning Children's Television Programming*, 11 FCC Rcd 10660, 10682-10695 (1996), the FCC adopted several procedures designed to increase public participation in respect to children's programming by broadcast stations. Several of these, such as designating a public liason and publicizing their reports with on-air announcements, could also be of use in the cable context.

In implementing the CTA, the Commission found that “some record-keeping requirements must be imposed in order to ensure that . . . cable operator assertions of compliance, as well as, allegations of violations, can be verified.” *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd 2111, 2113 (1991). Moreover, the Commission explicitly rejected relying solely on the public’s ability to watch programming. On reconsideration, it noted that “public monitoring by viewing programs and public monitoring by review of a . . . cable operator’s commercial records are *complementary* and useful checks on compliance.” *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd 5093, 5098 (1991) (emphasis added). Further, “[r]eview of operator records, for example, may disclose lapses in accurately reporting overages or violations that a citizen had failed to notice when viewing programming.” *Id.* at 5098, n. 67. The Commission likewise rejected the suggestion that cable network records be kept in a central clearinghouse rather than each operator’s public files, finding that the “public’s ability to access necessary commercial records readily, including those of cable and broadcast networks, is an important part of our scheme for enforcement of the Act.” *Id.* at 5098.

The cable companies offer no changed circumstances that lessen the continuing need for public access to records regarding commercials on children’s programming. Instead, the cable commenters argue that there have been “very few allegations that cable operators have violated the commercial limits on children’s programming.” *CATA Suggested NPRM*, at ¶ 6. However, even if true, the small number of complaints does not obviate the need for the recordkeeping. On the one hand, the lack of alleged violations may simply reflect that the recordkeeping scheme has been successful in ensuring compliance with the rules and thus, there is no reason to alter it. Alternatively, it could mean that the reliance on public monitoring is failing to detect violations, and that instead of abandoning the record-keeping requirements, new enforcement techniques such as audits need to be implemented.

A recent review of broadcaster performance found that twenty-six percent of commercial television station licensees could not certify to full compliance with commercial limits. *See Mass Media Bureau Advises Commercial Television Licensees Regarding Children’s Television Commercial Limits*, 13 FCC Rcd 10265 (1998). In the case of broadcast stations, the Commission relies on station certification as well as public monitoring to enforce compliance with the commercial limits. This poor performance on the part of the broadcast industry suggests that rather than making it more difficult for the public to monitor cable system compliance, the Commission should investigate whether the monitoring schemes are working to prevent overcommercialization on children’s programs shown on cable.

The Commission Should Not Modify the Sponsorship Identification Public File Requirements.

CATA proposes to eliminate the public file requirements in connection with sponsorship identification. *CATA Suggested NPRM*, at ¶¶ 19-20. Section 76.221 requires cable operators to identify the sponsors, if any, of origination cablecasts. 47 C.F.R. § 76.221. If the cablecast is either political in nature or is a matter of controversial public concern, and is paid for by a corporation,

association or other organization, § 76.221(d) requires cable operators to maintain a list of the chief executive officers or board members of that organization.

These public file requirements for sponsorship identification implement a most basic principle in our democratic society: the public's right to know when they are being persuaded and by whom they are being persuaded. *See Amendment of the Commission's Sponsorship Identification Rules, Sections 73.119, 73.289, 73.654, 73.789 and 76.221*, 34 F.C.C.2d 1104, 1105 (1972). The recent elections demonstrate that the continuing and even increased need for such disclosure. First, television advertisements have emerged as among the most decisive forces in determining the success of political campaigns.³ Second, political advertisements are increasingly aired on cable.⁴ Third, political advertisements are more commonly being funded by third-parties, which often are corporations or groups whose membership may not be commonly known from their name alone.⁵ Finally, television advertisements increasingly focus on negative campaign issues.⁶ It is therefore important that the Commission reaffirms its longstanding commitment to "ensuring that the public can reasonably identify who is using broadcast facilities to promote or oppose particular political candidacies." *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 1616, 1617 (1992).

³ See, e.g., Adam Nagourney, *Who? The Democrat for What? Barrage of Similar Ads Blurs Candidates and Messages*, N.Y. Times, Sept. 10, 1998, at B1; James Bennet, *Politics: The Commercials; Political Ads Leap from the TV Landscape*, N.Y. Times, Oct. 14, 1998, at A1.

⁴ See Jo Becker, *Officials Free Ads: Service or Favor?*, St. Petersburg Times, May 12, 1997, at B1. Political candidates often use cable to target a specific audience. See Richard Verier, *Rep. Prewitt Leads Race in Fund Raising*, St. Petersburg Times, Oct. 30, 1998, at A1. Further, this trend will probably continue to increase over the next decade because cable offers the "most ambitious plans" for the coverage of Congressional and other key races. See Tim Curran, *Election TV All You Need to Know About Cable and Network Coverage on Tuesday*, Roll Call, November 2, 1998.

⁵ See Thomas A. Fogarty, *Election Ads Take Negativity to a Level Never Seen Before*, Des Moines Register, Oct. 27, 1998, at A4.

⁶ See, e.g., *NPR Weekend Sunday*, (NPR, Oct. 11, 1998) (LEXIS Transcript No. 98101103-215); *CNN Saturday: Negative Ads Take Their Toll on Voters* (CNN cable television transmission, October 31, 1998) (LEXIS transcript No. 98103117V27); *Negative Ads as Campaigns Wind Down*, S.F. Chron., Nov. 2, 1998, at A7.

The Commission Should Not Allow Cable Operators to Provide Information Only in Response to a Specific Request.

Some members of the cable industry suggest that instead of maintaining a public file, they be allowed to make information available to the public “upon request.” *See, e.g., MediaOne Comments*, at 1-2; *SCBA Comments*, at 8. They claim that under an “available upon request” system, the industry would gain administrative efficiencies at no “cost” to the public because the industry would be given a “reasonable period of time”, *SCBA Comments*, at 8, to allow the public “necessary access” to “information deemed important”, *MediaOne Comments*, at 5. However, the cable industry’s proposal is entirely self-serving and contrary to the public interest.

An “on request” system would seriously delay public access to crucial information. The public file allows any member of the public direct access to the public file at any time during normal business hours. In the case of the advertising limits on children’s programs, the Commission has recognized that “[t]he public’s ability to access necessary commercial records readily . . . is an important part of our scheme for enforcement of the Act.” *Policies and Rules Concerning Children’s Television Programming*, 6 FCC Rcd at 5098. Moreover, immediate access is particularly important in the case of political advertising especially considering that MediaOne, for example, has acknowledged that it does receive requests to view the file. *See MediaOne Comments*, at 4. We are further concerned that if the cable companies were not required to maintain a public file, they would not collect and retain the information necessary to respond to public requests.

The Commission Should Not Exempt Small Cable System Operators with up to 15,000 Subscribers from Public File Requirements

The SCBA and other parties propose to expand the exemption to the Commission’s Part 76 public file requirements to all cable systems serving less than 15,000 subscribers. *See, e.g., SCBA Comments*, at 3; *CATA Suggested NPRM*, ¶¶26-28. We oppose any such expansion because it would allow an estimated two-thirds of cable operators serving approximately 12% of subscribers to evade the Commission’s important public interest rules.⁷ If anything, public file requirements may be more needed for small cable operators because they tend to serve outlying or rural communities which lack effective alternative communication sources.

⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7394 (1995). In this proceeding, the FCC expanded the category of cable systems eligible for special rate and administrative treatment to those serving 15,000 or fewer subscribers. However, this action does not provide any justification for exempting cable systems from the public file and notice rules, which are not burdensome, and are essential to ensuring that cable systems abide by the FCC’s rules.

The Commission Should Encourage Cable Operators to Use Technology to Make Public Files More Accessible Via the Internet.

We support Ameritech's proposal that the Commission allow cable operators to post certain public inspection records in electronic format on the company's web-site rather than maintain "hard copy" public files. *See Ameritech Comments*, at 6-7. Not only might it be less costly for operators, as Ameritech asserts, but more importantly, this option would provide the public with easier access to cable public file information. Some smaller cable operators oppose Ameritech's proposal claiming that creating and maintaining a web site is too costly. As a compromise, we suggest that the FCC require any cable operator that maintains a website for other purposes to place their public file information on it. The marginal costs of adding this information should be minimal. Cable systems that do not have a website for other purposes, could choose between creating such a website or continuing to retain paper files.⁸

We further agree with Ameritech that the information on the website should include EEO compliance documentation, must-carry certification, and documentation of compliance with commercial limits on children's television. *See Ameritech Letter* at exhibit 1. In addition, for the reasons discussed above, cable operators should post the sponsorship identification required by Section 76.221. Finally, cable operators should be required to post leased access information required by Section 76.970(h). Some of us know from personal experience that it is sometimes difficult to acquire accurate leased access information from cable companies.⁹ Making leased access information available on the web would facilitate access by potential leased access providers, thereby increasing the diversity of programming to the public.

For internet posting to be effective, however, members of the public need to know that this information is available. Cable operators should publicize the existence of such information by including bill inserts and placing the information on community cable channels. The Commission could help by placing notices on its webpage, and perhaps even offering hyper-links to cable operators' home pages.

⁸We also oppose MediaOne's suggestion that a cable company need only maintain a single public file for all systems within a state. *See MediaOne Comments*, at 5. This would place too great a burden on the public, particularly in larger states.

⁹ CME conducted a survey of leased access rates and had difficulty obtaining information required by the rules. *See Comments of Center for Media Education et al.*, in *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Leased Commercial Access*, MM Docket No. 92-266, CS Docket No. 96-60, at Appendix B (filed May 15, 1996).

In sum, in reorganizing and revising its public notice and file rules to make them easier to understand, the Commission must be sure not to undercut or eliminate reporting requirements designed to promote compliance with important public interest policies, such as commercial limits on children's programs and sponsorship identification of political programming. Likewise, the Commission should not undercut the effectiveness of the reporting and notice requirements by expanding the number of systems exempt from the requirement or changing to a "by request" system. Instead, the FCC should take steps to better inform the public of the availability of this information and make it easier for the public to access by, at a minimum, requiring those cable operators who maintain websites to post their public file information on those sites.

Respectfully submitted,

Of counsel:

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Consumer Federation of America
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